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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-491

ALTON & SOUTHERN RAILWAY CO., *et al.*, *Petitioners*,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes [hereinafter, "BRAC"] respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision by the United States Court of Appeals for the District of Columbia Circuit which affirmed a decision by the United States District Court for the District of Columbia denying petitioners' motion for a preliminary injunction. The decisions of the courts below have not been officially reported as of the date of this writing.

QUESTIONS PRESENTED

In the opinion of respondent BRAC, the following questions are presented by the Railroads' petition:

1. Does Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) protect from federal court injunctions striking or picketing by a labor organization directed against railroads who, because of their common interest in the labor dispute, have agreed to pay and are in fact paying substantial sums of monies to a struck primary carrier, in order to enable that carrier to withstand the economic pressure of the labor organization?

2. Does the Railway Labor Act (45 U.S.C. § 151, *et seq.*) authorize and protect striking or picketing by a labor organization directed against railroads who, because of their common interest with a struck primary carrier, have agreed to pay and are in fact paying substantial sums of monies to that carrier in order to enable that railroad to withstand the economic pressure which the labor organization is applying against it?

STATUTES INVOLVED

In addition to those statutory provisions set forth in Appendix D to the petition, respondent BRAC submits that Section 20 of the Clayton Act (29 U.S.C. § 52) is applicable; that statutory provision reads as follows:

> Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment,

> unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.
>
> And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

COUNTERSTATEMENT OF THE CASE

After having unsuccessfully exhausted the major dispute resolution procedures of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, respondent BRAC began to strike the Norfolk & Western Railway Co. [hereinafter, "N&W"] on July 10, 1978. The N&W sought to

enjoin respondent's resort to self-help, but its requests for Temporary Restraining Orders were denied, and on July 20, 1978, the United States District Court for the Northern District of Illinois denied the N&W's motion for a preliminary injunction. *Norfolk & W. Ry.* v. *Brotherhood of Railway and Airline Clerks*, N.D. Ill. No. 78 C 2577, decided July 20, 1978, *appeal pending* 7th Cir. No. 78-1936. In its decision denying the N&W's injunction request, the court stated:

> The broad duty imposed on carriers and employees by Section 2, First of the RLA [45 U.S.C. § 152, First] "to exert every reasonable effort to make and maintain agreements" and "to settle all disputes . . . in order to avoid any interruption . . . to the operation of any carrier" requires plaintiff [N&W] to more extensively bargain over defendant union's proposed changes in Scope than has occurred. Slip op. at 7.

After being on strike against the N&W for almost a month, respondents' officials began to hear rumors that the N&W was receiving approximately $800,000.00 per day from a mutual aid pact with its brother railroads while it was being struck. Those rumors were confirmed when seventy-three railroads sued respondent in the United States District Court for the District of Columbia on August 25, 1978, in order to enjoin respondent from taking concerted economic actions against them because of their financial aid to the N&W.

On August 27, 1978, the District Court issued a Temporary Restraining Order against respondent enjoining BRAC from taking concerted economic action against any of the petitioner Railroads solely because of their participation in the mutual aid pacts. Respondent then sought to engage in discovery and, over petitioners' objections, the District Court permitted respondent to

depose, among others, petitioners pursuant to Rule 30(b)(6), Fed. R. Civ. P.[1] As a result of that discovery, respondent was able to learn the details of the mutual aid pact among seventy-four of our nation's railroads.

In 1959 the railroads first entered into their mutual aid pact which they believed would enable them to ban together to use their economic resources to withstand strikes by labor organizations. In *Kennedy* v. *Long Island R.R.*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963), that pact was upheld against a claim that the plan was unlawful *per se* as being in violation of, among others, the Railway Labor Act. However, the railroads have amended that plan since the *Kennedy* case, and in 1969 they added an additional, supplemental plan as an option to participating carriers. That supplemental plan, as amended in 1971, enabled the carriers to receive up to twenty-five (25%) percent of their daily normal gross operating revenues in addition to the benefits provided by the basic plan. The basic plan benefits provided member carriers with an amount which was intended to cover their fixed expenditures in the event of a cessation of operations, including the "cost of the Supervisory, Official and other forces necessary in its opinion to preserve Applicant's carrier properties in a standby condition suitable for resumption of services at the end of a suspension of operations." Application For Service Interruption Policy, BRAC Ex. 1-A at 3.

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[1] Because of that discovery and of petitioners' deposing respondent officials, respondent consented to extend the Temporary Restraining Order for a brief period.

Prior to 1973, a "work stoppage" would be covered by the mutual aid pact even though in certain instances the dispute at issue may not have involved most of the participating carriers. However, in 1973 the so-called service interruption policies which constituted the mutual aid pact were amended to correct that "defect" because, as a representative of the Railroads explained:

> [T]here was considerable dissatisfaction on the part of railroads required to pay additional premiums for some issue as to which they had no concern.
>
> So that as a consequence it was decided to limit, reduce, the coverage under the policy to those situations which really were of general interest to the majority of the railroads. Johnson Tr. 80.

When the N&W sought to receive its daily indemnities under both the basic and supplemental policies in 1978, the plans provided, in effect, that the N&W would not be entitled to such payments unless, because of the issues involve in its labor dispute, it was within the economic self-interest of the other railroads to enable the N&W to be immune to respondent's economic self-help.

Within four days after respondent struck the N&W, the carrier applied for daily indemnities under both the basic and supplemental policies. Petitioners' Carrier Conference Committee concluded unanimously that the issues involved in the BRAC-N&W dispute were of common and vital interest to all of the strike insurance participants, and, thus, recommended that payments be made to the N&W. Acting upon that recommendation, the Advisory Committee under the policies authorized payments of $800,000.00 per day to the N&W because, as a member of that Committee agreed, it was in the economic self interest of the participating carriers to contribute to the defense of the N&W. Payments to the N&W began in middle August, and respondent estimates that the N&W has received or is entitled to receive $64,520,616.00 in strike insurance benefits.

After a hearing on petitioners' application for a preliminary injunction, the District Court on September 12, 1978, denied the application and dissolved its restraining order. The District Court, in so doing, considered the evidence adduced during discovery and found that petitioners had aligned themselves with the N&W in that carrier's dispute with respondent to such a degree that federal courts, because of the prohibitions of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, could not enjoin respondent from taking concerted economic action against petitioners. Relying upon the "economic self-interest test" set forth in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by equally divided Court*, 385 U.S. 20 (1966), as the appropriate standard to judge the reach of the Norris-LaGuardia Act, the District Court stated:

> [Respondents] intended picketing of Plaintiffs [petitioners] due to their participation in the strike insurance program qualifies under the "economic self-interest test" set out in the *Atlantic Coast Line* case, *supra*, and is therefore within the intended scope of Norris-LaGuardia protection. The economic self-interest test is satisfied when
>
> > a labor group attempts to bring secondary pressure upon the employer with whom its primary dispute exists by means of exerting primary pressure upon a secondary employer, who has aligned himself with the primary employer in some substantial manner. . . .

> The particular provisions of the strike insurance plan involved herein establish the necessary substantial alignment of Plaintiffs with N&W. And BRAC employees of Plaintiff companies share common interest with BRAC employees of N&W in the outcome of the N&W-BRAC controversy, just as Plaintiff companies share common interest with N&W in that same dispute.
>
> For these reasons, this Court is deprived of jurisdiction to issue an injunction by the Norris-LaGuardia Act. Defendant's right to take economic action arises from the N&W dispute and not from a separate dispute with Plaintiffs. . . . Appendix C to Petition at p. 9a.

Petitioners noted an appeal from that decision, and sought an injunction pending appeal. On September 15, 1978, the United States Court of Appeals for the District of Columbia Circuit, after considering pleadings of both parties which went to the merits of the appeal as well as to the merits of the motion for interim relief, summarily affirmed *sua sponte* the decision of the District Court denying the preliminary injunction. Petitioners then sought an injunction from the Court of Appeals pending filing and resolution of a petition for certiorari, and on September 18, 1978, the appellate court granted petitioners a four-day injunction. Petitioners next filed an application with Mr. Chief Justice Burger as a Circuit Justice seeking an interlocutory injunction, and on September 22, 1978, the same day that petitioners filed their petition, Mr. Chief Justice Burger continued temporarily the injunction and referred the application to the full Court. On September 26, 1978, Mr. Chief Justice Burger, after consulting the full Court, vacated the injunction and denied petitioners' application for interim injunctive relief.

On September 26, 1978, respondent began to picket carriers which interchanged traffic with the N&W and on September 27, 1978, respondent began to strike many of petitioners because of their participation in the mutual aid pact. On September 28, 1978, President Jimmy Carter, acting upon a recommendation from the National Mediation Board, issued an Executive Order creating a Presidential Emergency Board pursuant to Section 10 of the Railway Labor Act. 45 U.S.C. § 160. On September 29, 1978, the United States District Court for the District of Columbia in two consolidated cases, *Alton & Southern Ry., et al.* v. *BRAC*, D.D.C. No. 78-1829, and *United States* v. *BRAC, et al.*, D.D.C. No. 78-1838, issued a Temporary Restraining Order enjoining respondent from striking, and enjoining petitioners and the other railroads from taking reprisals and from not preserving the status quo which existed prior to the strike. A permanent injunction by consent was entered in those consolidated cases on October 6, 1978, imposing similar restraints. The status quo period of Section 10 of the Railway Labor Act would have expired on November 27, 1978, but has been extended by agreement to January 14, 1979.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decisions Below Applied A Federal Statute In A Manner Consistent With Well-Established Principles Of Federal Law

Petitioners argue that their request for a writ of certiorari should be granted since, in their opinion, this case presents an important question of federal law which has not been, but should be, settled by this Court. They argue that the decisions below, which they claim are without direct Supreme Court authority, decide an important issue primarily because, if permitted to

stand, the decisions will sound the death knell of their strike insurance plans. Respondent BRAC respectfully submits that this case does not merit review by this Court since the decisions below correctly apply a clear federal statute in a manner authorized by and consistent with past decisions of this Court.

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, clearly and unambiguously states that no federal court "shall have jurisdiction to issue" injunctive orders "in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute" from striking (Sections 4(a) and (i)) or picketing (Sections 4(e) and (i)). That Act and its predecessor, Section 20 of the Clayton Act, 29 U.S.C. § 52, were intended to "equalize before the law the position of workingmen and employer as industrial combatants" (*Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 484 (1921) (Brandeis, J., dissenting)), and "to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer." *Marine Cooks* v. *Panama S.S.Co.*, 362 U.S. 365, 370 n.7 (1960). And as this Court has consistently concluded, the protections of both the Clayton and Norris-LaGuardia Acts are not to be limited, as petitioners would have it, to a direct "employer-employee relation." *United States* v. *Hutcheson*, 312 U.S. 219, 231 (1941). Rather, the Acts deprive federal courts of jurisdiction to enjoin at the request of a private party[2]

[2] Sections 10(h) and (1) of the National Labor Relations Act, 29 U.S.C. § 160(h) and (1), carved a narrow exception to the Norris-LaGuardia Act and permitted injunction suits, but only by an NLRB attorney. *See, Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442 (1948).

picketing or striking, whether it is characterized as primary or secondary. *E.g., Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940); *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938).

Relying upon the history and the intent of the Norris-LaGuardia Act, the United States Court of Appeals for the Fifth Circuit, in *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R.R.*, 362 F.2d 649, 654 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1966), simply concluded that the "traditional economic self-interest justification concepts" was the applicable standard "to determine the intended scope of Norris-LaGuardia protection." That holding of the Fifth Circuit is entirely consistent with express statements of this Court as to the reach of the Clayton and Norris-LaGuardia Act (*e.g., United States* v. *Hutcheson, supra*, 312 U.S. at 232; *see also*, Local 189, *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 703-09 (1965) (Goldberg, J. dissenting and concurring)), and directly follows the dissent of Mr. Justice Brandeis in *Duplex Printing Press Co.* v. *Deering, supra*, 254 U.S. at 488, in which he states that Section 20 of the Clayton Act declares "the right of industrial combatants to push their struggle to the limits of the justification of self-interest . . . ." As Congress has expressed in the Norris-LaGuardia Act, and as this Court has stated on many occasions, "Mr. Justice Brandeis' dissent in *Duplex* has . . . carried the day in the courts of history . . . ." *Local 189, Meat Cutters* v. *Jewel Tea Co., supra*, 381 U.S. at 703 (Opinion of Goldberg, J.).

The Courts below relied upon the economic self-interest justification concepts, as did the court in the *Atlantic Coast Line* case, to determine the reach of the

Norris-LaGuardia Act, and applying that test to the case at bar, concluded that petitioners had aligned themselves with the N&W in such a substantial manner so as to bring respondent's economic response within the protections of the Norris-LaGuardia Act. This conclusion, it is respectfully submitted, is entirely consistent with *Hutcheson* and previous Clayton Act—Norris LaGuardia Act decisions of this Court since respondent surely had a self-interest justification in taking economic action against carriers who, because of their vital and common interests in the disputed contract issues, contributed substantial sums of monies to the N&W to aid the N&W to withstand BRAC's economic power. Moreover, the conclusion that the Norris-LaGuardia Act applies is also consistent with the decisions upholding the mutual aid pacts in the railroad and the airline industries, for in both decisions the courts relied in part upon the provisions in the Clayton and Norris-LaGuardia Acts to conclude that the pacts were lawful *per se*. *Air Line Pilots Assoc.* v. *CAB*, 163 U.S. App. D.C. 451, 454, 502 F.2d 453, 456 (1974), *cert. denied*, 420 U.S. 972 (1975); *Kennedy* v. *Long Island R.R.*, 319 F.2d 366, 372 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963).

Petitioners argue that the decisions below present an important issue because, if allowed to stand, they will constitute precedent supporting a spreading of a strike against one railroad to other railroads financially aiding that carrier under the strike insurance programs. If this occurs, petitioners assert, their only alternative would be to allow the programs to lapse. Respondent BRAC respectfully submits that such reasoning does not give the decisions below an importance which merits review by this Court. Petitioners' strike insurance program is an instrument of economic self-help which they believe is permitted by the Railway Labor Act; and if it is valid, then surely the unions could counter that program by responding with their economic power. As this Court and Congress have often noted, if one side of the industrial dispute may muster its economic forces to achieve ends which it considers desirous, so too may the other side exercise its economic power to defend against that attack. *United States* v. *Hutcheson, supra.*

Respondent rsepectfully submits that the decisions below are entirely consistent with the intended reach of the Norris-LaGuardia Act and with prior decisions of this Court.[3] And since the key to the future use of this case lies with petitioners—*i.e.*, whether they continue to aid struck carriers financially because of their mutual interest—this case does not present an issue which merits review by this Court.

II. The Decisions Below Are Entirely Consistent With The Accommodation Which Is Required Between The Norris-LaGuardia Act And The Railway Labor Act.

Petitioners attempt to support their request that this Court review the decisions below by asserting that the District Court disregarded controlling decisions of this Court when it failed, according to petitioners, to accommodate the Norris-LaGuardia Act to the Railway Labor Act. Petitioners argue that the conclusion below that

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[3] Petitioners argue that the grant of certiorari in the *Atlantic Coast Line* case "emphasizes the importance of review by the Court of the decision below in this case." Petition at 8. Respondent disagrees. A review of the briefs in both the *Atlantic Coast Line* case and *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969), shows that many of the issues in the *Atlantic Coast Line* case were resolved in the *Jacksonville Terminal* case.

the Norris-LaGuardia Act deprives federal courts of jurisdiction to enjoin respondent's response to the mutual aid pact assistance, is fundamentally at odds with the Railway Labor Act in that it permits respondent to engage in economic self-help against them without first having exhausted the dispute resolution procedures of Sections 5 and 6 of the Railway Labor Act. Since, according to petitioners, the threatened economic action by respondent was not consistent with the Railway Labor Act, the District Court erred in stating that the Railway Labor Act does not affect it determination. Appendix C at 9a. Respondent respectfully submits that petitioners' argument is without merit for it fails to recognize that the right to self-help under the Railway Labor Act is not limited to a direct employer-employee relation as petitioners would have it.

In contending that the courts below erred by not accommodating the Norris-LaGuardia Act to the Railway Labor Act in this case, petitioners assume that the Railway Labor Act prohibits economic action against an employer who is not a direct party to the bargaining. This, however, is contrary to this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 392-93 (1969). Moreover, an analogous argument as to the reach of the Norris-LaGuardia Act and the Clayton Act was expressly rejected in *United States* v. *Hutcheson*, *supra*, 312 U.S. at 233-236, where this Court concluded that the Acts' protections extended beyond a direct employer-employee relation. If the Norris-LaGuardia is to have any meaning in the Railway Labor Act context, the accommodation between the two acts must be read as being accomplished by interpreting a "labor dispute" as defined in Section 13 of the Norris-LaGuardia Act, 29 U.S.C.

§ 113, to be a dispute under the Railway Labor Act to which the right to self-help has arisen. This Court, it is respectfully submitted, has taken this approach to the two acts,[4] *Compare, Brotherhood of Railroad Trainmen* v. *Chicago R. & I.R.R.*, 353 U.S. 30 (1957), *with, Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570 (1971). In this case, the right to self-help has attached to respondent from its dispute with the N&W, and thus, the accommodation has been accomplished and the policy behind the Norris-LaGuardia Act—*i.e.*, to prevent judicial interference in labor struggles—prevented an injunction to prohibit respondent's peaceful picketing.

The major premise to petitioners' accommodation argument is that respondent must first exhaust the major dispute resolution procedures of the Railway Labor Act with each of the before the right to self-help attaches under the Act. That argument, however, was implicitly rejected by this Court's decision in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra,* where this Court held that:

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[4] Petitioners' reliance in a footnote on *Chicago & I.M.Ry.* v. *Brotherhood of Railroad Trainmen*, 315 F.2d 771 (7th Cir.), *vacated as moot*, 375 U.S. 18 (1963), to suggest that there is a conflict within the Circuits is misplaced. The court concluded that the Norris-LaGuardia does not prohibit the enjoining of a strike over a "minor dispute;" that conclusion is entirely consistent with the decisions below. The reasons for the result that the work stoppage was a minor dispute, however, were not set forth, and those reasons which may be gleaned from the dissent in that case are contrary to this Court's decisions in *Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397 (1976), and *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra*. More importantly, the decision of the Seventh Circuit was vacated as moot, and is therefore, of no precedental value. *E.g., United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

> [P]arties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute . . . [may] employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law. *Id.* at 392-93.

If petitioners' argument was meritorious, this Court would not have held in *Jacksonville Terminal* that secondary picketing was proper; yet this Court expressly upheld the right of unions to exert secondary pressures in a Railway Labor Act dispute. *Id.* at 393. What petitioners fail to recognize is that the right to self-help in this case arises solely from the BRAC-N&W dispute, and by aligning themselves with the N&W in that dispute, petitioners have in effect become parties to that dispute and self-help is, thus, justly available against them. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra; cf., Airline Pilots Assoc.* v. *CAB, supra* at 454, 502 F.2d at 456.

III. This Case Is Not An Appropriate Vehicle To Review By Certiorari The Questions Presented By This Petition Since The Posture Of This Case May Well Change Before A Decision Can Be Entered.

Except in exceptional circumstances, the normal practice of this Court is to decline to issue a writ of certiorari to review an interlocutory judgment such as the denial of a preliminary injunction in the case at bar. *E.g., Estelle* v. *Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting); R. Stern & E. Gressman, *Supreme Court Practice* at § 4.19, p. 300 (BNA 5th ed., 1978). This case, it is respectfully submitted, presents an excellent example for the wisdom of that normal practice since the circumstances of this case are such

that the posture of this case may well change before a decision can be rendered by this Court after a full briefing and argument schedule.

Petitioners filed this instant action for both injunctive relief and damages during a period in which respondent was engaged actively in an economic strike against the N&W. On September 28, 1978, however, the President of the United States created an Emergency Board pursuant to Section 10 of the Railway Labor Act, and thus, invoked the status quo provisions of that section. *See, Detroit, T.S.L.R.R.* v. *United Transportation Union*, 396 U.S. 142 (1969). Consequently, since shortly after the creation of the Presidential Emergency Board, respondent's right to self-help against the N&W, and thus, *a fortiori* against petitioners, has been suspended during the status quo period provided for by Section 10 of the Railway Labor Act.

Although respondent's right to employ self-help revives at the end of that period (now January 14, 1979),[5] unless an agreement is reached or imposed by Congress, it is highly probable that the posture of this case will be changed when, and if, the right to use self-help again exists. The Emergency Board is required by Section 10 to issue a report, and will most likely make findings and recommendations; the response of the parties to that report and its recommendations may well place this case in such a posture that a decision by this Court would be inappropriate. *See, Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 388 (1978). For example, if the N&W, encouraged by the prospect of further substan-

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[5] It is for this reason, it is respectfully submitted, that this phase of the case is not moot. *See generally, Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974).

tial aid from petitioners, refuses to accept the recommendations of the Emergency Board, and petitioners once again make payments under the policies to the N&W (*see,* BRAC Ex. 1-A at Art. III (1)(b), Art. VI (b)), then the provisions of Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, may well prevent petitioners from seeking injunctive relief irrespective of the proscriptions of Section 4 of that Act.

CONCLUSION

For the reasons set forth above, respondent BRAC respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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